No. 276.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

A. F. MIGEON, N. B. RINGELING and BENJAMIN TIBBEY,
Appellants,
vs.
THE MONTANA CENTRAL RAILWAY COMPANY,
Appellee.

APPELLANT'S BRIEF.

Appeal from the United States Circuit Court, for the District of Montana.

In the United States Circuit Court of Appeals for the Ninth Circuit.

A. F. MIGEON, BENJ. TIBBEY and N. B. RINGELING,
Appellants,
vs.
THE MONTANA CENTRAL RAILWAY COMPANY, a Corporation,
Appellee.

STATEMENT OF THE CASE.

This is a suit in equity to quiet title to two tracts of land, in area 3.67 and 9.60 acres respectively, situated Near Butte, Silver Bow County, Montana.

On July 2, 1877, Charles Colbert made a discovery of a quartz vein upon the premises in dispute and located thereon the Morning Star Lode Mining Claim, 750 feet east and 750 feet west of the point of discovery, and 300 feet on each side of the center of the vein. October 15, 1878, John Noyes and others made a placer location in the vicinity of and including the west 730 feet of the Morning Star Claim, and on December 17, 1878, made application for a patent for the same. Said application did not include any quartz veins or claims known to exist within the limits of the ground covered by the placer location. Final entry was made by said Noyes and others July 14, 1879, and the placer patent was issued to John Noyes July 25, 1880.

The discovery point on the Morning Star claim was between 10 and 20 feet east of the east boundary line of the

placer location. In April of 1879 or 1880 Charles Colbert sold one half of the Morning Star claim to Valentine Kropf and Harvey McKinistry. On January 1, 1882, said Harvey McKinistry located the Childe Harold Quartz Lode claim at the discovery point of the Morning Star claim, extendlng 1450 feet west and 50 feet east of said point and 300 feet on each side of the center of the vein.

June 20, 1885, Edward McKinistry, the distributee of the estate of Harvey McKinistry, deceased, deeded the Childe Harold claim to the appellants, who have ever since represented the claim as required by law.

July 25, 1887, the two tracts in dispute were deeded by assigns of John Noyes, to the appellee.

On September 26, 1887, appellants filed an apppli-cation for patent to the Childe Harold Lode claim in the U. S. Land office at Helena, Mont., and the appellee adversed the same.

December 10, 1887, appellee filed this suit to quiet title in the District court of the Second Judicial district of the state of Montana in and for Silver Bow county, and on July 16, 1890, under a provision of the Act of Congress admitting Montana as a state, secured its removal to the Circuit court for the Ninth Circuit District of Montana, and the case was filed there in December 24, 1891. Knowles, district judge of said court having been counsel in the case, was disqualified, and on April 30, 1895, trial was had before Beatty, judge of the District of Idaho, sitting as a chancellor. Decree for appellee, whereupon appellants appealed to this court.

The Noyes placer, M. E. 511, and the Childe Harold claim embrace within their boundaries both tracts in dispute.

The 9.60 acre tract is within the boundaries of the Noyes placer and the Morning Star claim.

The questions involved in the case are:

Was the vein upon which the Morning Star and Childe Harold claims were located a vein or lode known to exist within the boundaries of the placer claim on December 17, 1878 within the meaning of U. S. Rev. Stat., Sec. 2333?

Was the west 730 feet of the Morning Star claim on said date a part of the public domain, subject to entry appropriation or sale as public land, and if not, is not the placer patent void to that extent and as such subject to attack in this action?

In the Circuit Court of Appeals of the United States for the Ninth Circuit.

A. F. MIGEON, N. B. RINGELING and BENJAMIN TIBBEY,
Appellants,
vs.
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Appellee.

SPECIFICATION OF ERRORS

Specification of errors upon behalf of the appellants, Achille F. Migeon, N. B. Ringeling and Benjamin Tibbey.

Now come the appellants above named, after decree filed and entered, and say that in the record proceedings in the above entitled cause, and particularly in the decree entered therein. there is manifest error in this, to-wit:

NOTE—Owing to Judge Beattie's limited time in Montana the deposition testimony was not read at the trial, upon the understanding between counsel and the court that exceptions would be allowed to the rulings made upon the objections noted therein. In the opinion no ruling is made upon any of these objections.

————————————, Clerk.

The court erred in the admission and rejection of evidence as follows:

1. In rejecting, if it did reject it (see note by clerk) as evidence the original notice of location of the Morning Star Lode claim, "Exhibit A," offered by appellants in their deposition evidence and objected to by appellee, because:

A. Said notice fulfills the requirments of law and is by law made primary evidence of the acts constituting a valid location of a quartz claim.

2. In rejecting, if it did reject it, the deposition testimony of the witness, Charles Colbert, that his reason for sinking shaft "C" 75 feet west of the original discovery on the Morning Star claim was: That he saw at the discovery shaft that the vein ran east and west and that he knew he would strike the lead at shaft "C," because:

A. It was relevant and material evidence showing the extent of the Morning Star vein and its strike, essentials of a locatable quartz discovery and that said lode extended into the ground in dispute in this action.

B. It was admissible evidence to prove, in connection with the admission of John Noyes, the placer locator and patentee, on the trial, that he knew of the Morning Star discovery at or about the time it was made by Charles Colbert, that if he had made such examination of the ground subsequently located by him as placer, as the law requires he would have had personal knowledge that the strike of the Morning Star vein was into said placer ground; and that he is consequently chargeable with such knowledge, actual and constructive.

3. In rejecting, if it did reject it, the deposition testimony of appellant's witness, W. P. Emery, that the results of assays made by him of the Anderson Lode in the vicinity of the Morning Star claim and at about the time of its location, was about 14 ounces in silver and a small amount of gold to the ton, because:

A. Said evidence was brought out by appellee on cross examination of the witness.

B. Such evidence was competent and relevant as tending to prove that at the time of the Morning Star location land in the vicinity was valuable for quartz; that quartz lodes existed there and were known to exist; and as tending to disprove the testimony of appellee's witnesses to the contrary.

4. In rejecting the deposition of appellant's witness, George H. Newkirk, if it did reject it, of his conversation with Charles Colbert at the discovery shaft on the Morning Star in 1877 or 1878, in which Colbert stated that the ground was located and Newkirk said that from what he saw of the quartz he thought it was a good piece of property, because:

A. Said statement by Colbert is admissible evidence as part of the Res Gestae, being a declaration made by Colbert concerning his own property while in possession thereof and at about the time of its acquisition by him.

5. In rejecting the evidence of appellant's witness, Valentine Kropf, if it did reject it, of his conversation with Charles Colbert, in which the latter stated that the Morning Star claim was of full size for the reasons given in assignment No. 4.

6. In rejecting as evidence, if it did reject it, Exhibit "D," the affidavit of the performance by Thomas Overrand of the representation work on the Childe Harold claim for the year 1886, offered by appellants in connection with the deposition testimony, because: It is by law made admissible evidence.

7. In rejecting, if if it did reject it, as evidence Exhibit "E," the affidavit of intention, duly recorded, to hold the Childe Harold claim for the year 1894, offered by defendants in connection with the deposition testimony, because:

A. It is by law made admissible evidence.

8. In rejecting as evidence, if it did reject it, Exhibit "F," the certified copy of the recorded notice of location

of the Childe Harold claim by Harvey McKinistry, the original locator, offered by appellants in connection with the deposition evidence, because:

A. It is by law made admissible evidence.

B. In connection with Exhibits "G" and "H" and the original deed of the Childe Harold claim from Edward McKinistry to the appellants, Exhibit No. 3 it is primary evidence of the title of appellants and of their grantors to the Childe Harold claim.

9. In rejecting as evidence, if it did reject it, exhibit "G" the certified copy of the recorded decree of distribution rendered by the district court of Silver Bow County, Montana, of the estate of Harvey W. McKinistry, the original locator of the Childe Harold claim, distributing the same to Edward McKinistry the grantor of the appellants offered by the appellants in connection with the deposition evidence, because:

A. In connection with exhibit "G" and the original deed of the Childe Harold claim from said Edward McKinistry to the appellants, it is primary evidence of defendant's title to the Childe Harold claim.

10. In rejecting as evidence, if it did reject it, exhibit "H," the certified copy of the recorded deed of the Childe Harold claim from Edward McKinistry to the appellants, offered by the appellants in connection with the deposition evidence, because:

A. It is primary evidence of appellants' title to the Childe Harold claim.

11. In rejecting the evidence of the engineer John Gillie, a witness for the appellants at the trial, exception

taken and allowed by the appellants, as to the results of an examination made by him of several excavations or shafts upon the Childe Harold claim, and assays of ore taken therefrom, said shafts being on a direct line between shafts "A" and "C," the original points of discovery of the Morning Star vein, because:

A. Such evidence is material, relevant and competent to prove that the Morning Star vein justified exploitation and development; that it has been exploited and developed by the appellants at great expense, notwithstanding that their title to the claim has been disputed by this action during nearly the entire time since its purchase by them and such evidence would refute the finding of fact made by the court in its decree: "There does not seem to be any claim that more work than is necessary to hold the Childe Harold claim has been done thereon;" and "There is no evidence to satisfy me that any of the work was done with a view to the development of a valuable mine."

B. Such evidence is corroborative of the testimony of Charles Colbert, the original discoverer and locator of the Morning Star lode, as to its dimensions and strike at the time of its discovery by him in 1877 and that in that year he uncovered the vein in shaft "C," 75 feet west of the original discovery shaft.

12. In rejecting as evidence the certified copy of the recorded notice of location of the Pay Streak Quartz lode claim, offered by the appellants at the trial, said claim having been located in April, 1878 and adjoining the Morning Star claim on the west, because:

A. It is competent and material evidence corroborative of the evidence of appellants' witness, Daniel Zinn, given at the trial, as to the location of the Pay Streak lode claim by him, the date thereof, and that the Morning Star claim adjoined it on the east.

B. As evidence tending to prove by its reference to the Morning Star claim as adjoining it on the east, that in April, 1878, the Morning Star claim was a known located claim, this being prior in time to the date of location of the John Noyes placer.

13. In admitting the evidence of J. E. C. Barker, appellee's witness at the trial, exception taken and allowed by appellants, as to the percentage of mineral or the values of ores necessary to make quartz mining pay in Butte in 1878, and that the Morning Star vein could not then or now be worked at a forfeit, and as to the values of ores taken from the Aurora and Cora mines at about that time, because:

A. Such evidence is immaterial and irrelevant upon any issue involved in this action; the issue here is whether the Morning Star vein discovered in 1877, was a well-defined, mineral-bearing vein which would warrant exploitation or development. No law governing the acquisition of title to quartz mining property requires as an essential the discovery or taking out of ore of such value as will make quartz mining pay, and this principle is expressed in the decree.

14. In admitting the testimony of John Noyes, appellee's witness, at the trial, exception taken and allowed by appellants, that the ground in controversy was compara-

tively of greater value for placer than for quartz mining in 1877 and 1878, because:

A. Said Noyes did not testify, nor is there any testimony in the record, proving or tending to prove, that the ground in controversy or any part of it had ever been worked or located as placer ground prior to or at the time of, the Morning Star discovery and location in July, 1877.

B. Said Noyes' testimony does not show that any discovery of placer mineral deposits was ever made at the times mentioned, on the ground in dispute and therefore his testimony as to its value as placer ground is incompetent as opinion evidence not founded upon facts in evidence.

15. In admitting the testimony of De Grasse Palmer, appellee's witness at the trial, as to the per centage of mineral or the values of ores necessary to make quartz mining pay in 1878, and that the ground in dispute was more valuable in that year for placer than for quartz, because:

A. Such evidence is incompetent and immaterial for the reasons stated in assignments Nos. 13 and 14.

16. In admitting the testimony of L. S. Scott, appellee's witness at the trial, as to the selling price of copper ores at the Butte smelters in 1878 and that the ground in dispute was in that year of comparatively greater value as placer than as quartz ground, because:

A. Such testimony is incompetent for the reasons stated in assignment No. 14.

17. In admitting the testimony of Albert W. Nodding and D. G. Bronner, plaintiff's witnesses at the trial, that the ground in dispute was of comparatively greater value as quartz than as placer in 1878, because:

A. For the reasons stated in assignment No. 14, such testimony is incompetent.

18. In admitting the testimony of John McClaggin, appellee's witness at the trial, that in 1878 the ground in dispute was of comparatively greater value for placer than for quartz purposes; that in that year the expenditure of time and money to work ore carrying 30 oz. silver and $1 in gold to the ton would not be justified and that smelter charges for treating ore in Butte in that year were $60 per ton, because:

A. For the reasons stated in assignments Nos. 13 and 14, such testimony is incompetent and immaterial.

19. In admitting the testimony of H. Garfof, appellee's witness at the trial, exception taken and allowed by appellants, that copper ore of 27 per cent. value would not pay to work in Butte in 1878, because:

A. For the reasons given in assignment No. 13 such evidence is incompetent and immaterial.

20. In admitting the testimony of W. F. Cobban, appellee's witness at the trial, exception taken and allowed by the appellants, as to the value of the ground in dispute for town lot purposes in 1882, because:

A. Such testimony is irrelevant to any issue involved in this action.

21. There is manifest error in the decree in holding that the proposition of the cancellation of the Government patent to the ground in dispute is involved in this action, because:

A. The annullment or cancellation of a patent from the United States to land, can be effected and the proposition only by a suit in equity brought in the name of the United States and for that purpose where the patent is voidable and not void and the United States is not a party to this action.

B. The question of the cancellation of a patent cannot arise as to lands never granted by the patent or purporting to be granted thereby. The theory of the law with reference to placer patents is that they do not convey or purport to convey, any veins or lodes known to exist within the limits of the ground applied for at the date of application, or any quartz claims legally located upon such a vein or lode prior to such application; in the one case the lode or vein with the adjacent ground to the extent of 25 feet on either side of the center of the vein; in the other the located claim to the extent of the width as located not exceeding 300 feet on either side of the center of the vein located upon, are excepted from the placer patent, unless expressly mentioned in the application for patent, as effectually as though the exception were expressed in the patent by meets and bounds. The applicant for patent is conclusively presumed to waive all claims to such a vein or lode or located claim unless he expressly includes it in his application. The law governing the cancellation of a patent applies only

in cases where the patent purports to convey and does convey, the land as to which cancellation of the patent is sought, but where the issuance of the patent was secured by fraud. In this action if it is found as a fact that a quartz claim was located upon the ground in dispute and that such location was made upon the discovery of a vein prior to or at the time of the application for the Noyes placer patent, and said application did not include said located claim or known vein, the placer patent never conveyed, or purported to convey, such known vein or located claim. The court finds as a fact in its decree and opinion that the Morning Star claim was located July 2, 1877, and that a vein or fissure was developed in the discovery shaft and that the Noyes placer, located October 15, 1878, included 730 feet of the west end of the Morning Star claim. Upon this finding it follows as a matter of law that the Morning Star claim was a valid existing claim up to and including December 31, 1878, and that an inchoate title to the same had been withdrawn from the United States by the locators and their assigns. The Noyes placer application did not include the Morning Star vein or claim, and therefore neither said application nor the patent issued thereon could include said 730 feet of the Morning Star claim. The title thereto remained in the government, in trust for the claimants under the existing location and their assigns upon the perfection of their title or subject to subsequent appropriation by location, upon abandonment or forfeiture.

C. Even if the theory of the law stated in "*B*" is erroneous and the Noyes placer patent does purport to con-

vey the ground within the limits described therein, the proposition of cancellation cannot apply to a patent which is absolutely void. Upon the findings of fact by the court as above stated, the placer patent as to the west 730 feet of the Morning Star claim would be void for the reason that at the time of the application for said patent said west 730 feet of the Morning Star claim was property and the power to convey it had been withdrawn from the United States and a patent purporting to convey it would be an absolute nullity. The title remained in the locators and their assigns to be perfected upon the performance by them of the acts required by law and upon abandonment or forfeiture by them revested in the United States subject to subsequent location. As the Court further finds in its opinion, as a fact, that the Childe Harold claim was on January 1, 1881, located at the discovery point of the Morning Star claim, and that a part of it is included in the portion of the placer conveyed to the plaintiff. It follows that the defendants are entitled to a decree for that part of the Childe Harold claim included within the limits of the Morning Star claim and that portion of the placer conveyed to the plaintiff:

22. There is manifest error, in the decree and opinion of the Court, in its finding of fact therein contained, that the appellants "have held the Childe Harold claim since 1885 without any effort to develop it into a valuable property," and that "no work was done with a view of the development of a valuable mine," because:

A. Such finding is contrary to the uncontroverted evidence of the appellants, in the record, that the representation work has been done upon the claim since it was

conveyed to the appellants, except in the years 1893 and 1894, when the affidavits of intention to hold the claim were filed as required by law.

B. Such finding is inequitable and contrary to the facts disclosed by the record that the title to the premises in dispute has been in litigation since the commencement of this suit in 1887.

C. Such finding is not pertinent to any question of law involved in this action.

D. Such finding is contradictory to and inconsistent with the evidence of the performance of representation work and the finding of fact elsewhere in the opinion that "there seems to be no claim made that more work than was necessary to hold the same (The Childe Harold) has been done thereon." Representation work is development work and there is no rule of law which requires that development work or exploration under the constructive phrases, "'Justifying,' 'Exploration,' 'Exploitation,' or 'Expenditure'" as used in the opinions of the Courts, shall be more in extent or greater in value than the representation work required by law to hold a quartz claim.

23. There is manifest error in the decree and opinion of the Court in holding that the propositions "what is a known vein as defined by Sec. Rev. Stat. 2,333," and "whether such a known vein existed within the boundaries of the placer claim on December 17, 1878, the date of the application for patent therefor" are involved in this action, because:

A. Upon the findings of fact in the opinion stated ante with respect to the location of the Morning Star claim and the subsequent location of the Noyes placer covering the west, 730 feet of said claim the law with respect to "known veins" is eliminated from the case and the question of law presented is, "was the placer patent void as to the said 730 feet of the Morning Star claim for the reason that at the date of application therefor said portion was held by prior lawful appropriation as a claim was property, and the government had no power to convey it."

24. There is manifest error in the opinion and decree of the Court in holding "that the placer claim includes a part of what was the Morning Star and was located before the latter had been forfeited, is an objection that cannot be considered in a collateral attack upon a patent," because:

A. If the Morning Star was at the date of Noyes application a known claim and John Noyes had actual or constructive notice of its existence, the placer patent did not convey or purport to convey said 730 feet of the Morning Star claim. A patent is not collaterally attacked as to something it does not purport to grant.

B. If the placer patent did purport to convey said 730 feet of the Morning Star it was to that extent void and a void patent is subject to collateral attack. Said 730 feet, being embraced in a "known claim," was excepted from the patent by Act of Congress and by the terms of the instrument itself.

25. There is manifest error in the finding of fact in the decree and opinion with reference to the location in Butte and vicinity of mining claims for townsite and other

purposes without the sanction of law and the manifest consideration thereof to the disadvantage of the appellants, because:

A. Such finding is not pertinent to any issue in this action.

B. Such finding is contradictory of the finding of fact elsewhere in the opinion that the Morning Star claim was located upon a vein.

C. The only evidence in the record to support such finding was that of appellee's witnesses that they might locate the ground in dispute as mining ground, for surface purposes, in violation of law and upon false affidavits and in fraud of the United States, and detracts from the competency of their evidence to the advantage of appellants.

26. There is manifest error in the opinion and decree in the finding of fact that the Morning Star claim was abandoned, because:

A. There is no evidence in the record that it was ever abandoned by Harvey McKinistry or Charles Colbert.

B. Such finding is contradictory to the finding contained elsewhere in the opinion that the Morning Star claim was located upon a vein July 2, 1877. If it was so located at said time the law preserved its existence as a valid existing claim up to and including December 31, 1878, subsequent to the date of the placer application.

C. Even if it was abandoned after said date, the Noyes placer patent did not convey any part of it. Said patent could convey no more than Noyes asked for in

his application and he did not ask for any part of the claim as such and the law conclusively presumes that it was excepted from the application. If it was subsequently abandoned it became a part of the public domain subject to relocation.

27. There is manifest error in the decree in the application of the cases of Davis vs. Wiebold 139 U. S. 537, Dower vs. Richards 151 U. S. 558, Deffenbach vs. Hawke 115 U. S. 392 to the case at bar adversely to defendants. Those cases arose between claimants of the same land as mineral upon the one hand and purposes other than mineral on the other. They were dependent upon the construction of Rev. Stat., Sec. 2,392. Here the parties both claim title to the land as mineral land.

28. Where in error in the decree in adjudging for plaintiff according to the prayer of the complaint, because:

A. There is no evidence in the record of any damage resulting from occupation of the premises.

29. There is manifest error in the opinion of the Court in holding that "the defect that the placer claim covered a part of what was the Morning Star claim and was located before the latter was forfeited is cured by the issue of the placer patent," because:

A. For the reasons stated ante the placer location was an absolute nullity and void as to the ground covered by the Morning Star claim. The issue of a patent cures defects in a location, but cannot help an absolutely void one.

30. There is manifest error in the finding in the decree that the Morning Star vein was not a known vein on December 17, 1878, and that on said date no known vein or lode existed within the limits of the Noyes placer claim, because :

A. Such findings are not supported by the evidence and are contrary to the evidence contained in the record that the Morning Star vein was on July 2, 1877, known to exist in the premises in dispute and has ever since been known to so exist and was on said date a located claim and existed as such to January 1, 1879.

31. There is manifest error in the order of the Court contained in the record taxing costs, because :

A. Said costs were not legally taxed for the reasons stated in defendants appeal from the order of the clerk taxing the same contained in the record.

B. Plaintiff's witnesses were not summoned nor did they file affidavits as required by the rules of the Court.

Wherefore the defendants pray that the decree of the Circuit Court for the Ninth Circuit, District of Montana, be reversed, with directions to said Court to enter a decree in favor of the appellants for the Childe Harold Quartz Lode Claim, or so much of the same which is within the limits of that portion of the Noyes placer claim conveyed to the appellee and the original Morning Star claim and for costs.

GEORGE A. CLARK,

Solicitor for the Appellants.

The recorded location notice of the Morning Star claim, Exhibit "A," page 43, is admissible.

A. The lower Court admitted it. Page 519.

B. It was admitted by stipulation. Page 25.

C. It meets the requirements of law with reference to a recorded notice of location.

"Any person or persons who shall hereafter discover any mining claim * * * shall within twenty days thereafter make and file for record in the office of the recorder of the county in which said discovery is made, a declatory statement thereof in writing under oath before some person authorized by law to administer oaths describing said claim in the manner provided by the laws of the United States.

Stat. Mont. Act, Feb. 11, 1876.

Mont. Stat., 1879, Page 590, Sec 873:

"A copy of any record or document or paper in the custody of a public officer of this territoty or the United States within this territory, certified under the official seal * * * "May be read in evidence in an action or proceeding in the courts of this territory in the like manner and with the like effect as *the original could be if produced.*"

Mont. Stat., Act February 16, 1877.

Mont. Stat., 1879, Page 139, Sec. 525.

Congress has legislated upon the manner in which the public mineral lands of the United States may be appropriated; a state statute which imposes additional

requirements, as to an oath, inconsistent with existing federal law, cannot stand.

U. S. Rev. Stat., Title XXIII, Chap. 1, Secs. 1851, 1891.

U. S. Constitution, Art. IV, Sec. 3

U. S. Constitution, Art. VI, Par. 2.

U. S. Constitution, Amendment X.

U. S. Rev. Stat., Sec. 2324.

Choteau vs. Gibson, 13 Wall., 99.

Hauswirth vs. Butcher, 4 Mont., page 309.

Wenner vs, McNulty, 7 Mont., page 36.

Hoyt vs. Russell, 117 U. S., page 401.

Davidson vs. Bordeux, 15 Mont.; page 251.

McKowan vs. McClay, 16 Mont, 236.

Preston vs. Hunter, 67 Fed. Rep., page 996.

A. Even if defective it would still be admissible to show constructive notice of the existence of a known vein within the limits of the ground in controversy.

Brownfield vs. Bier, 15 Mont., page 403.

Charles Colbert's testimony as to his reasons for sinking 75 feet west of his original discovery on the Morning Star, is admissable (page 47) for the reasons stated in par. 2 of the specification of error.

W. P. Emery's testimony as to the results of assays of the Anderson Lode, (page 146) is admissible for the reasons stated in par. 3 of the Specification of Errors.

George Newkirk's testimony as to his conversation with with Charles Colbert and the latter's statement that the ground was located (page 173) is admissible as part of the Res Gestate.

Mont. Stat., Feb. 11, 1876.

Mont Stat., 1870, page 153, Sec. 604.

"Where also the declaration, act or ommission forms part of a transaction which is itself the fact in dispute, or evidence of that fact, such declaration, act or ommission is evidence as part of the transaction."

Valentine Kropf's testimony as to Colbert's statement of the size of his claim (page 110) is admissible as part of the res gestae.

See Mont. Stat., ante.

Exhibits "D" and "E" (pp251-253) affidavits of rep. and performance of annual work on Childe Harold claim are admissible.

Mont Stat , Act Feb 27, 1885.

Rev Stat Mont , 1887, P. 1056, Sec. 1486

"The affidavit or affidavits named in the preceding sections, or copies thereof duly certified by the recorder of the county shall be duly received and admitted in evidence in any court of justice in this territory and be prima facie proof of the facts recited therein.

Act of Congress, July 18, 1894 (Amend 2424.)

Exhibit "F" (page 255) recorded notice of Childe Harolde claim is admissible.

Mont Stat , 1879, pp 590 and 139, Secs. 873 and and 525 ante.

Exhibit "G" (page 259) cert. copy decree distribution est Harvey McKinistry, is admissible.

Mont Stat., 1879, P. 139, Secs. 525 and 526 and p. 193, Sec 5.

Sec 526. * * * "The several Probate courts of this territory shall be courts of record."

Sec. 525. "A copy of any record, document or paper in the custody of a public officer of this territory * * * "Certified under the official seal * * * may be read in evidence in an action or proceeding in the courts of this territory."

Sec. 5. "The seal of the court need not be affixed to any proceedings except * * * "To the authentication of a copy of a record * * * "For the purpose of being used as evidence in another court."

Exhibit "H" (page 264) certified copy of deed Childe Harold claim to defendants is admissible.

Mont. Stat., Sec. 525 ante.

John Gillie's testimony as to the results of examination of and assays from several shafts or excavations upon the Childe Harold lode (pp. 281 and 304) is admissible for the reasons stated in Par. 2 of the Specificatians of Error and as tending to prove that the Morning Star vein warranted exploitation and was exploited.

The certified copy of the Pay Streak Lode claim, p. 574, is admissible, for the reasons stated in Par. 12 of the Specifications of Error and as corroborating the testimony (Page 355) of Zinn the locator.

The testimony of Barker, Noyes, Palmer, Scott, Bronner, McClaggin and Garfof (par. 13, 15, 16, 17, 18 and 19 Specification of Errors) as to the value of ores to make quartz mining pay in 1878 (p. 418, 440, 451, 460, 472, 479, 485, 486 and 490) is inadmissible, being irrelevant to the issues.

No. Noonday Min. Co. vs. Orient Min. Co. 1 Fed. rep. 531, 6 Sawyer 300.

Brownfield vs. Bier, 15 Mont. 409.

Shreve vs. Copper Bell Co., 11 Mont. 309.

The testimony of Noyes, Palmer, Scott, Nodding, Bronner and McClaggin (Spec. Par. 14, 15 and 18) pp. 439, 451, 460, 465, 473 and 479 as to the comparative value of the ground in controversy as placer or quartz in 1878 is incompetent. There is no evidence in the record of any placer mining having been done on said ground prior to to July 2, 1877. The witnesses do not qualify themselves by testimony as to what its value was as placer.

Brownfield vs. Bier ante.

The testimony of W. F. Cobban (p. 495) as to the value of the ground for town lots in 1882 is incompetent and irrelevant as to the issues in this case.

ERRORS IN DECREE.

The proposition of the annulment of the government patent to the ground in controversy (p. 520) is not involved.

A patent can be annulled by bill in equity brought in the name of the United States.

19 Am. & Eng. Ency. of Law. Page 350 and Note 1.

The Noyes patent is void as to known veins within the placer ground not applied for and as to the portion of the Morning Star claim within the placer boundaries, because at the date of the Noyes application that portion had been withdrawn from the public domain and the government had no power to convey it.

U. S. Rev. Stat., Sec. 2333.

19 Am. & Eng. Ency. of Law, pp. 350, 353 and 354 and notes.

Morton vs. Nebraska, 21 Wall, 660.

Belk vs. Meagher, 104 U. S., 279.

Noyes vs. Mantle, 127 U. S., 348 and 5 Pac. 864.

Renshaw vs. Switzer, 13 Pac., 127.

Shepley vs. Cowan, 91 U. S., 338.

Eureka Case, 4 Sawyer, 317.

Stark vs. Storrs, 6 Wall, 418.

Forbes vs. Gracy, 94 U. S., 762.

Steel vs. Smelting Co., 106 U. S., 450, 459.

Richmond Min. Co. vs. Rose, 114 U. S., 576.

Smelting Co. vs. Kemp, 104 U. S , 647.

Tallbot vs. King, 6 Mont., 108, 111, 112.

Silver Bow Co. vs. Clark, 5 Mont., 378.

Robinson vs. Smith, 1 Mont., 416.

Sherman vs. Buick, 93 U. S., 209.

Stoddard vs. Chambers, 2 Howard, 284.

Easton vs. Salisbury, 21 Howard, 428.

Reichart vs. Felps, 6 Wall, 160.

Patterson vs. Tatum, 3 Sawyer, 164.

"There does not seem to be any claim that more work than that necessary to hold it (Childe Harold claim) has been done thereon. "There is no evidence to satisfy me that any of the work was done with a view to developing a valuable mine." (Page 530).

There is no rule of law requiring defendants to do either. Defendants were only required to represent the claim. This they have done.

Pages 251, 253, 389 to 410.

U. S Rev. Stat., Sec. 2324.

The Morning Star claim was a valid and existing claim and as such was property withdrawn from the public domain and the control of the United States government up to and including December 31, 1879.

Supp. U. S. Rev. Stat., 1874-1891, p. 276.

Record pp. 85, 113, 115, 319.

Belk vs. Meagher, 104 U. S , 279.

The comment of the Court on the practice of locating mining claims in the vicinity of Butte City for their surface (p. 530) evidently considered by the Court to defendant's prejudice was error. All the testimony upon that subject came from plaintiff's witnesses, who swore that they "might locate the Childe Harold claim for town lot purposes."

Pages 450, 452, 495, 514, 515.

Such testimony is an admission that they would commit perjury and perpetrate a fraud upon the United States and should impeach their entire testimony.

There is no evidence that the Morning Star claim was abandoned. Pages 519, 530. The evidence is that it was not abandoned at all, or at least not before January 1, 1880.

Pages 85, 86, 93, 319, 113 and 255.

The cases of Davis vs. Wiebold, 139 U. S., 537, Dower vs. Richards, 151 U. S., 558, and Deffenbach vs. Hawke, 115 U. S., 392, (pp. 525 and 528) do not apply to the issues in this action.

See facts of above cases.

The Morning Star vein, or lode, was "known to exist" within the meaning of the term as used in Sec. 2333 of the Revised Statutes of the United States to except it from the operation of the placer patent on the date of application therefor. When is a vein or lode "known to exist" within the meaning of the statute?

Noyes vs. Mantle, 5 Mont., 856.

Noyes vs. Mantle, 127 U. S., 348.

Stevens vs. Williams, 1 McCrary, 480.

Iron Silver Mining Co. vs. Mike and Starr Mining Co., 143 U. S., 396.

Sullivan vs. Iron Silver Mining Co., 143 U. S., 431.

Iron Silver Mining Co. vs. Cheeseman, 116 U. S., 538.

Book vs. Justice Mining Co., 58 Fed., Rep. 120.

Brownfield vs. Bier, (Mont.), 38 Pac., Rep.

Shreve vs. Copper Bell Mining Co., 11 Mont., 309.

Burke vs. McDonald, (Idaho), 29 Pac., Rep. 96.

North Noonday Mining Co. vs Orient Co., 6 Sawyer, 299.

Eureka Mining Company vs. Richmond Mining Co., 4 Sawyer, 302.

Jupiter Mining Co. vs Bodie, 2 Fed , Rep 675

Mining Co. vs. Campbell, 16 Morrison, Min. Rep. 218.

Harrington vs. Chambers, 3 Utah, 94.

The time when the vein or lode within the placer must be "known to exist" in order to be excepted from the grant of the patent, is by section 2333, the date of application for the patent, which in the case at bar was December 17, 1878.

Iron Sil. Min. Min. Co. vs. Mike and Starr Co , 143 U. S. 394.

The term "known vein" in section 2333 is not synonymous with "Located claim," but refers to a vein or lode whose existence is known as contradistinguished from one which has been appropriated by location.

Mike and Starr case and Brownfield vs. Bier.

Sullivan vs. Iron Min Co., 143 U. S., 431 ante.

The court below was in error in holding (page 522) that the requisites of a vein which would justify a location under Sec. 2320 are different from those applied to a "known vein" under Sec 2333. If any of the late decisions seem to imply to the contrary, they are in derogation of the spirit and letter of Sec. 2333, which reads * * * "And where a vein or lode such as is described in Sec 2320, is known to exist, etc."

What constitutes a vein or lode within the meaning of 2320. Justices Field and Miller, Judges Sawyer, Hallet and Hawley have all given practically the same definition. Mr. Justice Miller's, in Mining Co. vs. Cheeseman, 116 U. S. 535, approves in these words. "We are not able to see how the judge who presided at the trial of the case could have better discharged this delicate task than he has in the charge before us:" the following:

"A lode or vein is a body of mineral or mineral bearing rock within well defined boundaries in the general mass of the mountain In this definition the elements are the body of mineral or mineral bearing rock and the boundaries. With either of these things

well established very slight evidence may be accepted as to the existence of the other * * * "On the other hand, with well defined boundaries, very slight evidences of ore within such boundaries will prove the existence of a lode."

Eureka case—Mike and Starr case.

Noonday Co vs Orient Co.

Jupiter Co. vs. Orient Co.

Stevens vs. Williams, 1 McCrary, 488.

Book vs. Justice Min. Co.

Shreve vs. Copper Bell Co.

Burke vs. McDonald.

Harrington vs. Chambers, all cited ante.

Not one of the appellee's witnesses denies the existence of the requirements of these definitions in the discovery excavations made by Charles Colbert on the Morning Star claim in 1877.

See record, rebuttal evidence.

In the case at bar not only was a vein "known to exist" prior to the dates of the placer location and application, but a claim had been located upon it, and Mr. Noyes, the placer applicant, had not only constructive knowledge of this fact, but personal knowledge of said vein and claim.

See rebuttal evidence, pp. 437, 438 and 442.

There is no equity in favor of the appellees as innocent purchasers. They had notice of an adverse claim through the recorded declaratory statement of the Childe Harold claim.

Particular attention is called to Mantle vs. Noyes, 127 U. S., cited ante. That case is identical as to facts and dates with the case at bar.

The case of Hauswirth vs. Butcher, (Montana, cited in the brief), ought to dispose of the question as to the sufficiency under state law of the affidavit of verification of the Morning Star recorded notice of location In that case the lode claim was located in May, 1877, in Deer Lodge County, Montana, and the recorded declaratory statement was exactly the same in respect to the verification affidavit as the Morning Star notice in this case. In that case the Supreme Court of Montana sustained the notice as sufficient on the ground that most of the notices recorded in Silver Bow and Deer Lodge counties were verified in the same way and applied the maxim "Communis Error Facit Jus."

Hauswirth vs. Butcher, 4 Mont., 299.